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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
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8 **Robert Ybarra,**
9 Petitioner
10 -
11 **Warden Dennis Smith,**
12 Respondent

CV-09-1447-PHX-DGC (JRI)

13 **REPORT & RECOMMENDATION**
14 **On Petition for Writ of Habeas Corpus**
15 **Pursuant to 28 U.S.C. § 2241**

16 **I. MATTER UNDER CONSIDERATION**

17 Petitioner, presently incarcerated in the Federal Correctional Institute (“FCI”) at
18 Phoenix, Arizona, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241
19 on July 10, 2009 (Doc. 1). On September 17, 2009 Respondents filed their Response (Doc.
20 8). Petitioner filed a Reply on September 30, 2009 (Doc. 10).

21 The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned
22 makes the following proposed findings of fact, report, and recommendation pursuant to Rule
23 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28
24 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

25 **II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND**

26 **A. FACTUAL BACKGROUND**

27 Petitioner is a federal prisoner at FCI Phoenix, who was convicted of a violation of
28 supervised release, (CR93-0238-PHX-ROS at Doc. 131, 133) and ten counts of bank
robbery and attempted bank robbery, (CR98-0427-PHX-ROS at Doc. 74; Petition, Doc. 1
Exhibit A, Judgment). The judgment in CR98-0427, imposed on August 15, 1999, provided
for payment of restitution of \$32,181.54 and a special assessment pursuant to 18 U.S.C. §

1 3013 of \$1,000.00. (*Id.*) The judgment provided:

2 All monetary penalties are due immediately or in regular monthly
 3 installments. Because incarcerated, payments shall begin under the
 4 Bureau of Prisons Inmate Financial Responsibility Program. Any
 unpaid balance shall become a condition of supervision and shall be
 paid within 90 days of the expiration of supervision.

5 (*Id.* at 1.)

7 **B. ADMINISTRATIVE PROCEEDINGS**

8 **Petitioner's Payment Plan** - The Bureau of Prisons' Inmate Financial Responsibility
 9 Program (IFRP) is a "voluntary" program whereby inmates' in-prison income is applied to
 10 their financial obligations. "As part of the initial classification process, staff will assist the
 11 inmate in developing a financial plan for meeting those obligations, and at subsequent
 12 program reviews, staff shall consider the inmate's efforts to fulfill those obligations as
 13 indicative of that individual's acceptance and demonstrated level of responsibility." 28
 14 C.F.R. § 545.10. The obligations to be paid include: "(1) Special Assessments imposed
 15 under 18 U.S.C. 3013; (2) Court-ordered restitution; [and] (3) Fines and court costs." 28
 16 C.F.R. § 545.11. Although the program is "voluntary," failure to participate has a variety of
 17 deleterious effects, e.g. loss of furlough, performance pay, housing priority, access to
 18 community-based programs, etc.. See 28 C.F.R. § 545.11(d).

19 On or about April 1, 2008, Petitioner signed a payment plan to make monthly
 20 payments of 50% of his wages toward his restitution. (Petition, Doc. 1, Exhibit B, Reg. Dir.
 21 Resp. 2/27/09.)

22 **Informal Resolution** - On January 14, 2009, Petitioner submitted a grievance or
 23 "Informal Resolution" (Petition, Doc. 1, Exhibit B, Informal Resolution), asserting that
 24 because the sentencing court had not set a repayment schedule, his restitution and special
 25 assessment were not properly deemed a financial obligation. That request was denied.

26 **Administrative Remedy** - On or about January 15, 2009, Petitioner submitted a
 27 Request for Administrative Remedy (Petition, Doc. 1, Exhibit B) challenging the same issue,
 28 citing *U.S. v. Gunning*, 401 F.3d 1145 (9th Cir. 2005) and *U.S. v. Lemoine*, 546 F.3d 1042 (9th

1 Cir. 2008). On January 28, 2009, that request was denied by Respondent Chavez on the basis
2 that BOP Program Statement 5380.08 directs that “[a]bsent direction from the court
3 concerning when an obligation should be collected, payments may begin during an inmate’s
4 period of incarceration.” (Petition, Doc. 1, Exhibit B, Remedy #523162-FI.) Petitioner was
5 advised that he could appeal to the Regional Director. (*Id.*)

6 **Regional Appeal** - On or about January 30, 2009, Petitioner submitted his Regional
7 Administrative Remedy Appeal (Petition, Doc. 1, Exhibit B), making the same argument.
8 On February 27, 2009, Regional Director denied that appeal. (Petition, Doc. 1, Exhibit B,
9 Reg. Dir. Resp. 2/27/09.) Petitioner was advised that he could appeal the denial to the Office
10 of General Counsel. (*Id.*)

11 **Central Office Appeal** - On or about March 10, 2009, Petitioner submitted the same
12 claim in his Central Office Administrative Remedy Appeal (Petition, Doc. 1, Exhibit B).
13 On April 1, 2009, the Administrative Remedy Coordinator rejected the appeal, citing
14 Petitioner’s failure to provide copies of his grievance and response, and advising him he had
15 15 days to resubmit the appeal (*id.* at Rejection Notice).

16 Petitioner resubmitted the appeal on or about April 21, 2009. (Answer, Doc. 8,
17 Attach. A, Curless Decl., Exhibit 3.) After an extension of time to respond until June 20,
18 2009 (Petition, Doc. 1, Exhibit B, Extension 6/2/9), on July 15, 2009, the National Inmate
19 Appeals Administrator denied Petitioner’s appeal on the merits. (Answer, Doc. 8, Attach.
20 A, Curless Decl., Exhibit 3.)

21

22 **C. PRESENT FEDERAL HABEAS PROCEEDINGS**

23 **Petition** - Petitioner commenced the current case by filing his Petition for Writ of
24 Habeas Corpus pursuant to 28 U.S.C. § 2241 on July 10, 2009 (Doc. 1). Petitioner’s Petition
25 asserts a single ground for relief challenging the collection of restitution under the IFRP.

26 **Response** - On September 17, 2009, Respondents filed their Response (“Answer”)
27 (Doc. 8). Respondents argue that Petitioner failed to exhaust his administrative remedies,
28 and that his claim is without merit.

Reply - On September 30, 2009, Petitioner filed a Traverse (Doc. 10), arguing that the administration's failure to rule on his appeal by June 20, 2009 was deemed a denial and resulted in exhaustion, and that his claim has merit.

III. APPLICATION OF LAW TO FACTS

A. EXHAUSTION

Exhaustion Requirement - Ordinarily, a federal prisoner bringing a habeas petition challenging his confinement must exhaust his available administrative and judicial remedies by presenting his claims in accordance with applicable procedures, and failure to do so justifies dismissal of the petition. *Francis v. Rison*, 894 F.2d 353 (9th Cir. 1990); *Nigro v. Sullivan*, 40 F.3d 990 (9th Cir. 1994).

Respondents cite 42 U.S.C. § 1997e of the Prison Litigation Reform Act as establishing a jurisdictional exhaustion requirement. However, that provision relates only to prison condition suits, such as those brought pursuant to 42 U.S.C. § 1983, etc.. 42 U.S.C. § 1997e(a). At least nine circuits have held that the PLRA does not apply to habeas petitions. *See Blair-Bey v. Quick*, 151 F.3d 1036, 1039 (D.C. Cir. 1998); *Martin v. Bissonette*, 118 F.3d 871, 874 (1st Cir. 1997); *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 634 (2nd Cir. 2001); *Santana v. United States*, 98 F.3d 752 (3rd Cir. 1996); *Davis v. Fechtel*, 150 F.3d 486, 488-489 (5th Cir. 1998); *Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000); *Malave v. Hedrick*, 271 F.3d 1139 (8th Cir. 2001); *McIntosh v. U.S. Parole Com'n*, 115 F.3d 809, 811 (10th Cir. 1997); and *Skinner v. Wiley*, 355 F.3d 1293 (11th Cir. 2004).

Intervening Exhaustion - Respondent concedes that the issuance of the July 15, 2009 appeal denial exhausted Petitioner's administrative remedies (Response, Doc. 8, Attach, A, Curless Declaration), but argues Petitioner's habeas petition was filed earlier (on July 10, 2009), and that post-filing exhaustion is not sufficient.

In *McKinney v. Carey*, 311 F.3d 1198 (9th Cir. 2002), the court held that for purposes of prisoner civil rights suits and the exhaustion requirement of the PLRA under 42 U.S.C. § 1997e, failure to exhaust prior to filing was fatal, and could not be cured by exhaustion

1 during the litigation. That holding was based upon the strong congressional policies
 2 underlying the PLRA. As noted above, however, the PLRA is not applicable to habeas
 3 petitions.

4 Respondents point to no other cases holding that exhaustion subsequent to filing but
 5 prior to dismissal for failure to exhaust is fatal to a habeas petition under 28 U.S.C. § 2241.
 6 In *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984), a pre-AEDPA state
 7 habeas case, the court held that "an appellate court may give relief if state remedies are
 8 exhausted by the time it acts, even if these remedies were not exhausted when the habeas
 9 corpus petition was filed."

10 In light of *Schwartzmiller*, the non-jurisdictional nature of exhaustion in a 2241
 11 proceeding, and the fact that the only step not taken by Petitioner at the time of his petition was
 12 to receive the final administrative decision, the undersigned concludes that Petitioner's post-
 13 filing exhaustion of his administrative remedies is sufficient.

14 **Exhaustion by Lack of Ruling** - Moreover, Petitioner points out that the decision on
 15 July 15, 2009 was past due. Controlling regulations provide the General Counsel 40 calendar
 16 days to respond to an appeal, and provide that the time "may be extended once by . . 20 days
 17 at the Central Office level." 28 C.F.R. § 542.18. Here, the permitted extension was granted
 18 at the Central Office level, setting a due date of June 20, 2009. (Petition, Doc. 1, Exhibit B,
 19 Extension 6/2/9.) "If the inmate does not receive a response within the time allotted for
 20 reply, including extension, the inmate may consider the absence of a response to be a denial
 21 at that level." 28 C.F.R. § 542.18. Thus, upon expiration of the June 20, 2009 deadline,
 22 Petitioner was entitled to consider his appeal to the General Counsel/Central Office denied.
 23 At that point, there were no further administrative remedies for him to pursue.

24 Thus, as of June 21, 2009, Petitioner's administrative remedies were exhausted, and
 25 his habeas petition was not premature. Thus, this Court is required to address the merits of
 26 his Petition.

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1 **B. BOP AUTHORITY TO COLLECT**

2 Petitioner argues that because the sentencing court failed to establish a specific
 3 payment schedule, BOP is without authority to collect (or to require as part of an IFPR
 4 payment plan) restitution

5 Respondent counters that participation in the IFRP is voluntary, the IFRP authorizes
 6 BOP to set a payment schedule, and that nothing in the cases cited by Petitioner invalidates
 7 the IFRP.

8 To the contrary, under the decisions relied upon by Petitioner, his restitution order is
 9 an invalid delegation to the BOP, is thus invalid, and cannot be collected on by the BOP
 10 under the IFRP.

11 In *U.S. v. Gunning*, 401 F.3d 1145 (9th Cir. 2005), the Ninth Circuit set aside a
 12 sentence in which the court provided that restitution was “payable immediately,” but “during
 13 the time of his imprisonment, it was to be paid through the BOP Inmate Financial
 14 Responsibility Program (IFRP).” *Id.* at 1147. The Ninth Circuit found this to be an improper
 15 delegation to the BOP of the court’s responsibility to set the schedule for payment of
 16 restitution, as required by the 1996 Mandatory Victims Restitution Act (MVRA), Pub. L.
 17 104-132, 110 Stat. 1214, 1233 (1996). As codified, that Act mandates:

18 Upon determination of the amount of restitution owed to each victim,
 19 the court shall, pursuant to section 3572, specify in the restitution order
 20 the manner in which, and the schedule according to which, the
 21 restitution is to be paid.

22 18 U.S.C. § 3664(f)(2).

23 Conversely, in *U.S. v. Lemoine*, 546 F.3d 1042 (9th Cir. 2008), the circuit court found
 24 no improper delegation where the sentence provided for the defendant to “pay restitution
 25 during his imprisonment ‘at the rate of not less than \$25 per quarter, and pursuant to the
 26 Bureau of Prisons’ Inmate Financial Responsibility Program.’ ” *Id.* at 1044. Moreover, the
 27 circuit court distinguished between the court’s imposed schedule and the schedule imposed
 28 by BOP under the IFRP. “While the MVRA forbids the wholesale delegation of scheduling
 responsibility to the BOP, nothing in the text of the statute or our prior decisions places any

1 limits on the BOP's operation of an independent program, such as the IFRP, that encourages
 2 inmates voluntarily to make more generous restitution payments than mandated in their
 3 respective judgments." *Id.* at 1048.

4 In Petitioner's case, the sentence provided:

5 All monetary penalties are due immediately or in regular monthly
 6 installments. Because incarcerated, payments shall begin under the
 7 Bureau of Prisons Inmate Financial Responsibility Program. Any
 unpaid balance shall become a condition of supervision and shall be
 paid within 90 days of the expiration of supervision.

8 (Pet. Exhibit A, Judgment at 1.) No amount for the 'regular monthly installments' was
 9 specified.

10 The sentencing court could have stopped with the direction for immediate payment.¹
 11 "Immediate repayment is the general rule: 'A person sentenced to pay a fine or other
 12 monetary penalty, including restitution, shall make such payment immediately, unless, in the
 13 interest of justice, the court provides for payment on a date certain or in installments.' " *U.S.*
 14 *v. Martin*, 278 F.3d 988, 1006 (9th Cir.2002) citing 18 U.S.C. § 3572(d). *See also* 18 U.S.C.
 15 § 3664(f)(3)(A) (authorizing direction for a "single lump sum payment"). Had Petitioner's
 16 judgment simply specified that the sums were due "immediately," then the schedule would
 17 have been set by the court and no improper delegation would have occurred. *See Ward v.*
 18 *Chavez*, 2009 WL 2753024, *5 (D.Ariz. 2009)(“payment was due ‘immediately,’ and it
 19 provided no delegation of authority for scheduling those payments to the BOP”); and *U.S.*
 20 *v. Young*, 533 F.Supp.2d 1086 (D.Nev. 2007) (judgment properly provided “restitution to be
 21 due immediately, and that any balance remaining due upon release shall be paid [in specified
 22 installments and was] silent as to any schedule of payments while imprisoned.”)

23 Alternatively, the judgment could have specified the amount of monthly installments.
 24 *See* 18 U.S.C. § 3664(f)(3)(A) (providing for court to set "partial payments at specified
 25 intervals").

26
 27 ¹ Of course, the sentencing court could have done so only after consideration of
 28 Petitioner's resources, projected income, and financial obligations. *See* 18 U.S.C. §
 3664(f)(2)(A) to (C).

1 The judgment in Petitioner's case did not do either, but simply provided for either
2 immediate payment or installments, and left it to BOP to select a payment amount during the
3 term of incarceration. Thus, this case is indistinguishable from *Gunning*. “[T]he sentencing
4 court here said nothing about a restitution schedule during incarceration and delegated that
5 responsibility to the BOP by requiring Petitioner to participate in the IFRP and pay restitution
6 pursuant to that program.” *Sours v. Chavez*, 2009 WL 2714028 (D.Ariz. 2009) (granting
7 relief from IFRP where judgment required restitution “be paid in full immediately...”[a]ny
8 amount not paid immediately shall be paid while in custody through the Bureau of Prisons'
9 Inmate Financial Responsibility Program”). Therefore, Petitioner does not have a valid
10 restitution order against him.

11 Still, Respondent argues that Petitioner's participation in the IFRP is voluntary. To
12 the contrary, the judgment in this case mandated Petitioner's payment of restitution through
13 the IFRP and left it to the BOP to calculate the amounts.

14 Moreover, the BOP's authority is limited to collecting “Court-ordered restitution.”
15 28 C.F.R. § 545.11. Because the Court's order of restitution is invalid, BOP has no authority
16 under the IFRP to collect the restitution amounts.

17

18 **IV. CERTIFICATE OF APPEALABILITY**

19 Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the
20 “district court must issue or deny a certificate of appealability when it enters a final order
21 adverse to the applicant.” However, such certificates are only required in cases concerning
22 detention arising “out of process issued by a State court”, or in a proceeding under 28 U.S.C.
23 § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). This case
24 arises under 28 U.S.C. § 2241, and does not attack a State court detention. Moreover, under
25 the recommendation made herein, it will not be resolved adversely to Petitioner.
26 Accordingly, no ruling on a certificate of appealability is required, and no recommendation
27 thereon will be offered.

28

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Petitioner's Petition for Writ of Habeas Corpus, filed July 10, 2009 (Doc. 1) be **GRANTED**.

IT IS FURTHER RECOMMENDED that the Bureau of Prisons be ordered to stop collecting restitution payments from Petitioner through the Inmate Financial Responsibility Program.

V. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also Rule 8(b), Rules Governing Section 2254 Proceedings.* Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

DATED: September 17, 2010

JAY R. IRWIN
United States Magistrate Judge